

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>M.B., a minor, by and through her parent and natural guardian, T.B., Plaintiff,</b>	:	
	:	<b>CIVIL ACTION</b>
	:	
	:	
<b>v.</b>	:	
	:	
<b>CITY OF PHILADELPHIA, et al., Defendants.</b>	:	<b>No. 00-5223</b>
	:	

**MEMORANDUM AND ORDER**

**SCHILLER, J.**

**March , 2003**

**I. INTRODUCTION**

Plaintiff M.B., through her natural guardian, T.B., brought this action alleging civil rights violations and state law claims against Defendants City of Philadelphia (“City”), Philadelphia Department of Human Services, Wayne Gregory, Thomas Cieslinski, Women’s Christian Alliance (“WCA”), Marva Rountree, S. Robinson, Sandra Lewis, Jenlene Jones, Constance Savage, Naomi Byrd, Lisa Kerwin, Mary Barksdale, and Irving Ford. By Order of March 4, 2003, the Court granted summary judgment in favor of the City. The individual City employees, Wayne Gregory and Thomas Cielinski, thereafter settled with Plaintiff. The only claims that now remain are the Pennsylvania state law negligence claims against WCA, its individual employees, and Mary Barksdale, and the state law claims of assault, battery, infliction of emotional distress, and false imprisonment against Irving Ford. Now before the Court is Plaintiff’s motion in limine to deem Defendant Mary Barksdale an agent of Defendant WCA as a matter of law.<sup>1</sup> For the reasons set forth

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<sup>1</sup> Initially, Plaintiff sought to deem Mary Barksdale an agent of WCA and the City. In light of the summary judgment motion in favor of the City, Plaintiff has withdrawn the motion with respect to the City.

below, I grant Plaintiff's motion.

## **II. BACKGROUND**

Plaintiff M.B. is a minor who was removed from her biological mother's care by the City and placed in foster care. The Philadelphia Department of Human Services contracted with the Women's Christian Alliance ("WCA") to place M.B. in a WCA foster home. Plaintiff M.B. was placed in Defendant Mary Barksdale's foster home in Philadelphia on two separate occasions. WCA and Mary Barksdale executed a Foster Parent's Placement Agreement and an Individual Service Plan that governed M.B.'s placement with Mary Barksdale. (Exs. A & B, attached to Pl.'s Mot. in Limine.) At issue in this case are events that allegedly occurred during M.B.'s second placement with Mary Barksdale from September 1995 to September 1996. Plaintiff alleges that Defendant Barksdale allowed a man by the name of Irving Ford to live in her basement, and Irving Ford sexually molested and raped M.B., for which he plead guilty to statutory sexual assault, indecent assault, and corrupting a minor on October 15, 2001. Plaintiff also alleges that as result of the sexual molestation and rape, Irving Ford transmitted Human Papilloma Virus ("HPV") to M.B.

At trial, it is expected that Plaintiff will attempt to prove that Defendant Mary Barksdale was negligent in permitting Irving Ford to live at the foster home while M.B. was also living there. Additionally, Plaintiff will attempt to prove that WCA was negligent because it knew or should have known that Irving Ford was living at the foster home during M.B.'s second placement. Plaintiff asserts that she filed the motion presently before the Court because "[i]t is expected at trial that defendant[] WCA . . . will attempt to distance [itself] from defendant Barksdale and will argue that no agency relation[ship] existed between them. . . .[as] defendant Barksdale's liability in this case, in permitting defendant Ford to live in the Foster home alongside M.B., is monumental." (Pl.'s Mot.

in Limine at 2.) In this respect, Plaintiff seeks to deem Mary Barksdale an agent of WCA as a matter of law in order to implicate vicarious liability of WCA for Mary Barksdale's negligence and impute her knowledge of Irving Ford's presence in the foster home to WCA.

### **III. DISCUSSION**

The issue before the Court is whether Mary Barksdale, a foster mother, can be deemed an agent of WCA, a foster agency, under Pennsylvania law and, if so, whether such agency implicates vicarious liability and imputes knowledge of Irving Ford's presence in the home to WCA. The existence of an agency relationship is determined from the individual facts of each case, and when the facts are undisputed, is properly determined by a court as a matter of law. *See Field v. Omaha Standard, Inc.*, 582 F. Supp. 323, 328 (E.D. Pa. 1983) (citing *Juarbe v. City of Philadelphia*, 431 A.2d 1073, 1076 (Pa. Super. Ct. 1981), *aff'd without opinion*, 732 F.2d 145 (3d Cir. 1984). Under Pennsylvania law, "the basic elements of agency are 'the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking.'" *See Scott v. Purcell*, 415 A.2d 56, 60 (Pa. 1980) (quoting RESTATEMENT (SECOND) OF AGENCY § 1, cmt. b (1958) and *Chalupiak v. Stahlman*, 81 A.2d 577, 580 (Pa. 1951)). An agency relationship can be found "if there is an agreement for the creation of a fiduciary relationship with control by the beneficiary." *Smilach v. Westfall*, 269 A.2d 476, 481 (Pa. 1970) (citing *Rosenberg v. Cohen*, 88 A.2d 707 (Pa. 1952) and RESTATEMENT (SECOND) OF AGENCY § 1, cmts. a and b (1958)). Under Pennsylvania law, the general rule is if an agency relationship is found, the knowledge of an agent who is acting within the scope of his authority can be imputed to the principal. *See Field*, 582 F. Supp. at 327(citing *Higgins v. Shenango*

*Pottery Co.*, 256 F.2d 504, 510 (3d Cir. 1958)).

A determination of an agency relationship, however, does not necessarily implicate the principal's vicarious liability for an agent's negligent acts. *See Smilach*, 269 A.2d at 481. Central to the determination of whether an agency relationship implicates vicarious liability are the degree of control and right of control of the principal over the agent's authority. *See id.* As the Supreme Court of Pennsylvania has noted:

“The right of control by the principal may be exercised by prescribing what the agent shall or shall not do before the agent acts, or at the time when he acts, or at both times. . . . Further, the principal has power to revoke the agent's authority, although this would constitute a breach of his contract with him. . . . The control of the principal does not, however, include control at every moment; its exercise may be very attenuated and, as where the principal is physically absent, may be ineffective.” RESTATEMENT (SECOND), AGENCY § 14, comment a. Since an agent who is not a servant is not subject to any right of control by his principal over the details of his physical conduct, the responsibility rests upon the agent alone, and the principal is not liable, for harm caused by his unauthorized negligent physical conduct. *Commonwealth v. Minds Coal Mining Corp.*, 360 Pa. 7, 60 A. 2d 14 (1948); RESTATEMENT (SECOND), AGENCY § 250 (1958). Thus it has long been said to be the general rule that there is no vicarious liability upon the principal in such case. Prosser, THE LAW OF TORTS § 70 (3d ed. 1964).

*Id.* Thus, “the agency relationship that renders the principal liable is that of master-servant” and is established when ““a master has the right to exercise control over the physical activities of the servant within the time of service.”” *See Jones v. Century Oil U.S.A., Inc.*, 957 F.2d 84, 87 (3d Cir. 1992) (quoting *Smilach*, 269 A.2d at 481); *see also McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 853-54 (3d Cir. 1996) (noting that “an agent may be either an independent contractor or a servant (or employee in modern day parlance). . . .[and] although there are a number of factors relevant to this

inquiry. . . the most important factor is the degree of control exercised by the principal”) (citing *Feller v. New Amsterdam Cas. Co.*, 70 A.2d 299, 300 (Pa. 1950); *Moon Area Sch. Dist. v. Garsony*, 560 A.2d 1361, 1367 (Pa. 1989); and *Hammermill Paper Co v. Rust Eng’g Co.*, 243 A.2d 389, 392 (Pa. 1968)).<sup>2</sup>

That being said, “[e]ven in circumstances where a master-servant relationship does not exist, an agency relationship may give rise to vicarious liability on the part of the principal for the torts of the agent.” *Stephenson v. Coll. of Misericordia*, 376 F. Supp. 1324, 1329 (E.D. Pa. 1974) (citing *Smalich*, 269 A.2d 476, 481 (citing RESTATEMENT (SECOND) OF AGENCY § 250 (1958))). As the

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<sup>2</sup> The parties’ arguments rely solely on the distinction between an employee (or servant) and an independent contractor (or non-servant agent) as articulated in *Hammermill Paper Co. v. Rust Eng’g Co.*, 243 A.2d 389, 392 (Pa. 1962). As the Supreme Court of Pennsylvania recently noted, the relevant factors in determining whether particular relationship is that of an employee-employer or owner-independent contractor, and thus, implicates vicarious liability, is set forth in *Hammermill Paper*. See *Universal Am-Can, Ltd. v. Workers’ Compensation Appeal Bd.*, 762 A.2d 328, 333 (Pa. 2000). In *Hammermill Paper*, the Supreme Court of Pennsylvania stated:

While no hard and fast rule exists to determine whether a particular relationship is that of employer-employee or owner-independent contractor, certain guidelines have been established and certain factors are required to be taken into consideration: Control of manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one is engaged in a distinct occupation or business; which party supplied the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer, and also the right to terminate the employment at any time. *Stepp v. Renn*, 184 Pa. Super. 634, 637, 135 A.2d 794 (1957). See also *Hader v. Coplay Cement Mfg. Co.*, 410 Pa. 139, 150, 189 A.2d 271 (1963).

*Hammermill Paper*, 243 A.2d at 392, *Universal Am-Can*, 762 A.2d at 333 (quoting same). In this case, however, the Court does not need to reach these factors because, as discussed below, I do not base my decision on the existence of an employee-employer (or servant-master) relationship.

Restatement (Second) of Agency states:

Non-liability for Physical Harm by Non-Servant Agents. . . . A principal is not liable for physical harm caused by the negligent physical conduct of a non-servant agent during the performance of the principal's business, if he neither intended nor authorized the result nor the manner of performance, unless he was under a duty to have the act performed with due care.

RESTATEMENT (SECOND) OF AGENCY § 250 (1958), *see also Stephenson*, 376 F. Supp. at 1329 n.9

(*quoting* same). Thus, a principal may be liable for harm caused by the negligent conduct of a non-servant agent when the principal was under a duty to have the act performed with due care. *See id.*

In this case, the relationship between WCA and Mary Barksdale is undisputedly governed by the Foster Parent's Placement Agreement and M.B.'s Individual Service Plan. As such, the Court may determine, as a matter of law, the relationship between the parties pursuant to these agreements. *See Smilach*, 269 A.2d at 481 (holding that an agency relationship can be determined by agreement); *see also Field*, 582 F. Supp. at 328 ("If the facts concerning the connection between the parties are not in dispute, questions concerning the existence and the nature of the relationship are properly determined by the court."). The Foster Parent's Placement Agreement and the Individual Service Plan for M.B. clearly state that "[t]he W.C.A. has financial, medical and social service responsibilities for M.B.," and "[Mary Barksdale] is responsible to the W.C.A. for the day-to-day care of M.B." (Foster Parent's Placement Agreement, Ex. A, attached to Pl.'s Mot. in Limine, at 1; and Individual Service Plan for M.B., Ex. B, attached to Pl.'s Mot. in Limine.) The Foster Placement Agreement also states that the placement would be supervised by a WCA caseworker and that "[a]ny major change in [Mary Barksdale's] family composition, housing or economic status must be reported to the agency at once and evaluated as to whether it affects the agency's continued use of [Mary Barksdale's] home. This applies to such factors as the number of persons regularly in the home, sleeping arrangements or family income." (Foster Parent's Placement Agreement at 2,3.)

From this reading, it is clear that Mary Barksdale and WCA had an agency relationship. The

agreements embody a manifestation by WCA that Mary Barksdale would “be responsible to the W.C.A. for the day-to-day care of M.B.,” for which Ms. Barksdale accepted the undertaking by signature, and an understanding of the parties that WCA was ultimately responsible and in control of the “financial, medical and social service responsibilities for M.B.” (Foster Parent’s Placement Agreement at 1-4.) *See Scott*, 415 A.2d at 60 (stating basic elements of agency relationship). Quoting this language, WCA admits that it was to “supervise the placement of [the] child in the home. . . . evaluating how the child’s physical, social, educational, and other needs were being met, and reviewing the adequacy of the overall case plan with Mary Barksdale.” (Def’s Answer to Pl.’s Mot. at 2.) Similarly, WCA admits that “[t]he placement agreement . . . indicates that an agency caseworker would review and make sure that M.B. . . . w[as] being adequately cared for.” (*Id.*)

As an agency relationship clearly existed, Mary Barksdale’s knowledge of Irving Ford’s presence at the foster home can be imputed to WCA. Mary Barksdale was responsible for the day-to-day care of M.B. and was acting within the scope of this authority when she permitted Irving Ford to live at the foster home and have daily contact with M.B. while he lived there. In determining whether the agency relationship between Mary Barksdale and WCA was such that vicarious liability is warranted, I do not reach the distinction of whether Mary Barksdale was an agent-servant or an agent-independent contractor. Even if Mary Barksdale is a non-servant agent of WCA, WCA is liable for physical harm caused by the negligent conduct of Mary Barksdale, if proven. Although WCA may not have authorized Irving Ford’s residence in the foster home, and may not have authorized the specific way for Mary Barksdale to undertake M.B.’s day-to-day care, WCA was clearly under the duty to have Mary Barksdale’s daily care of M.B. performed with due care as it ultimately had “financial, economic, and social service responsibilities for M.B.” (Foster Parent’s Placement Agreement, at 1.) Therefore, I find that Mary Barksdale was an agent of WCA as a matter of law and WCA is liable for her negligent acts, if negligence is proven by Plaintiff at trial. An

appropriate Order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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	:	<b>CIVIL ACTION</b>
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v.	:	
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<b>CITY OF PHILADELPHIA, et al., Defendants</b>	:	<b>No. 00-5223</b>
	:	

**ORDER**

**AND NOW**, this     day of **March, 2003**, upon consideration of Plaintiff M.B.'s Motion in Limine to Deem Defendant Mary Barksdale an Agent of Defendants WCA and the City (Document No. 67); and the responses thereto, and for the reasons stated above, it is hereby **ORDERED** that:

Plaintiff M.B.'s Motion in Limine to Deem Defendant Mary Barksdale an Agent of Defendants WCA and the City (Document No. 67) is **GRANTED** in part and **DENIED** in part as follows:

1. To the extent that this motion seeks to deem Defendant Mary Barksdale an agent of Defendant WCA, the motion is **GRANTED**.
2. To the extent that this motion seeks to deem Defendant Mary Barksdale an agent of Defendant City of Philadelphia, the motion is **DENIED** as moot.

**BY THE COURT:**

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**Berle M. Schiller, J.**